United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

Docket No. 76-7373

In The

United States Court of Appeals

For the Second Circuit

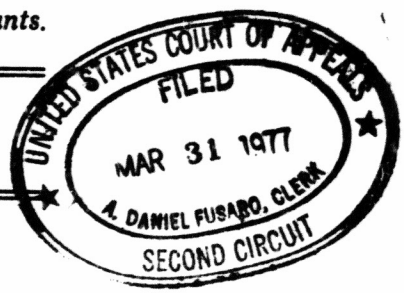
GERALDINE SEVOR,

Plaintiff-Appellee,

— *vs* —

LITTON INDUSTRIES, INC., LITTON BUSINESS SYSTEMS, INC., and McBEE SYSTEMS, A Subsidiary of Litton Industries,

Defendants-Appellants.



PETITION FOR DEFENDANTS-APPELLANTS

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-vs-

LITTON INDUSTRIES, INC.,
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McBEE SYSTEMS,,A Subsidiary of
Litton Industries,

Docket No. 76-7373

Defendants-Appellants.

NOTICE OF PETITION FOR REHEARING IN BANC.

Upon the annexed petition, dated March 24, 1977, Litton Industries, Inc., Litton Business Systems, Inc., and McBee Systems, incorrectly designated by plaintiff as "A Subsidiary of Litton Industries", by Brennan, Centner, Palermo & Blauvelt, their attorneys, seek a rehearing and suggest a rehearing in banc of the panel decision of this Court, decided March 17, 1977, declaring that this Court improvidently granted certification pursuant to 28 U.S.C. §1292(b) and remanding the case to the United States District Court for the Western District of New York.

Dated: March 24, 1977

BRENNAN, CENTNER, PALERMO & BLAUVELT

By: Anthony R. Palermo
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NOTICE OF PETITION FOR REHEARING IN BANC.

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PETITION FOR REHEARING IN BANC.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

GERALDINE SEVOR,

Plaintiff-Appellee,

-vs-

LITTON INDUSTRIES, INC.,
LITTON BUSINESS SYSTEMS, INC., and
McBEE SYSTEMS, A Subsidiary of
Litton Industries,

Docket No. 76-7373

Defendants-Appellants.

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT:

Petitioners herein, Litton Industries, Inc., Litton Business Systems, Inc., and McBee Systems, incorrectly designated by plaintiff as "A Subsidiary of Litton Industries", by Brennan, Centner, Palermo & Blauvelt, their attorneys, petition this Court for rehearing and suggest that this proceeding is appropriate for consideration by all the Circuit Judges in regular active service convened in banc, and in support of this petition represent as follows:

1. By order of December 9, 1976, a panel of this Court, consisting of the Honorable Leonard P. Moore, the Honorable Wilfred Feinberg, and the Honorable Murray I. Gurfein, Circuit Judges, granted petitioners' motion dated November 19, 1976 for leave to appeal pursuant to 28 U.S.C. §1292(b). A copy of said order is attached as Exhibit A. A copy of the motion for leave to appeal is attached as Exhibit B.

2. Pursuant to said leave to appeal, the matter

was argued on the merits on February 28, 1977 before a separate panel of this Court, consisting of the Honorable William Hughes Mulligan and the Honorable James L. Oakes, Circuit Judges, and Frederick van Pelt Bryan, District Judge. Decision was reserved and subsequently, by order on March 17, 1977, said panel entered an order stating that it found the earlier panel of this Court had "improvidently granted certification pursuant to 28 U.S.C. §1292(b) for the questions presented by this interlocutory appeal". Accordingly, the case was remanded to the District Court, without any instructions or guidance. A copy of the order of the second panel is attached hereto as Exhibit C.

3. The rehearing of a matter previously argued before a panel of a Court of Appeals is specifically authorized by Rule 40 of the Federal Rules of Appellate Procedure ("FRAP"), and the rehearing of cases in banc is specifically authorized by Section 46(c), Title 28, United States Code, and Rule 35 of the FRAP.

4. The background and significance of the orders, decisions and legal questions presented is outlined in petitioners' original petition for leave to appeal (Exhibit B) which is incorporated herein by reference for purposes of brevity. Petitioners beseech the Court to read carefully the well-reasoned decision of the Honorable John T. Curtin, dated November 16, 1976, certifying the questions of law pursuant to 28 U.S.C. Section 1292(b).

5. Your petitioners recognize that rehearings in banc are not favored, but believe exceptional circumstances exist in the instant case to secure and maintain uniformity and consis-

tency in the Court's decisions. Moreover, your petitioners believe the legal issues presented involve questions of exceptional importance and far-reaching consequences, not only to the appellants but to all concerned with fair and just enforcement of the Civil Rights Act. It is respectfully submitted the original panel which granted leave to appeal correctly apprehended the significance of the legal issues involved when it granted leave to appeal. It is respectfully suggested that the second panel, which in effect overruled the decision of the prior panel, did not fully appreciate the applicable law and overlooked the practical consequences of its refusal to decide the questions certified by the court below.

6. As pointed out by Judge Curtin:

> "...an appellate ruling on these issues will materially advance the ultimate termination of the litigation. Discovery, especially production of records, will be enormously reduced if, on appeal, the parent corporation is dismissed from the suit and the issues involved in the plaintiff's prior employment are narrowed. This would eliminate the need for extensive court supervision of discovery and greatly simplify the trial itself."

7. It is respectfully submitted that partial summary judgment as a matter of law, dismissing the suit as to the defendant Litton Industries, Inc., should have been granted at the very least with respect to matters involved in plaintiff's employment prior to her resignation effective September 1, 1973. If this relief alone is granted, discovery and the trial will be enormously simplified. There is no question of fact with respect to the voluntary termination of Sevor's employment in

September, 1973. (See paragraph 18 of plaintiff's complaint at page 9 of the Record on Appeal.) No new employment is even alleged by plaintiff with anyone until December, 1974. (See paragraph 19 of her complaint at page 9 of the Record on Appeal.) No discrimination complaint was filed by plaintiff until February 28, 1975 when a complaint was filed with the New York State Division of Human Rights. This date is approximately nineteen months after plaintiff's voluntary termination of employment. Accordingly, plaintiff has failed to meet the jurisdictional prerequisite to Federal Court suit as to any alleged discrimination relating to this prior employment.

There is no question that the applicable statutory requirements make timely filing of a discrimination charge with the Equal Employment Opportunity Commission ("EEOC") a jurisdictional prerequisite to institution of a Federal Court action based upon an alleged violation of Title VII. 42 U.S.C. 2000e-5(e). This legal rule is clearly enunciated in case decisions. See McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973), where the United States Supreme Court referred to the statutory requirement as follows:

> "Respondent satisfied the jurisdictional prerequisites to a federal action (i) by filing timely charges of employment discrimination with the Commission and (ii) by receiving and acting upon the Commission's statutory notice of the right to sue, 42 USC §§2000e-5(a) and 2000e-5(e).

Other circuit courts have agreed with this clear prerequisite to Federal Court action. See Moore v. Sunbeam Corp.,

459 F.2d 811 (7th Cir. 1972); Stebbins v. Nationwide Mutual Insurance Co., 382 F.2d 267 (4th Cir. 1967), cert. denied, 390 U.S. 910 (1960); Richardson v. Miller, 446 F.2d 1247 (3rd Cir. 1971). See also DeMatteis v. Eastman Kodak Co., 511 F.2d 306 (2nd Cir. 1975).

It is further submitted that it is a jurisdictional prerequisite to the filing of a civil action that a complaint be filed with the EEOC against the party to be charged with respect to the particular allegations detailed against such respondent specified in the EEOC charge. See LeBeau v. Libby-Owens-Ford, 484 F.2d 798 (7th Cir. 1973); Mickel v. South Carolina State Employment Service, 377 F.2d 239 (4th Cir. 1967); Bowe v. Colgate Palmolive Co., 416 F.2d 711, 719 (7th Cir. 1969).

In the LeBeau v. Libby-Owens-Ford case, supra, Associate Justice Clark, speaking for the Seventh Circuit, stated:

> "None of the complainants before the EEOC named the International Union as a respondent and that Union never appeared or participated before the Commission. Title VII employment discrimination suits are permitted only 'against the respondent named in the charge' before the EEOC, 42 USC §2000e-5(f)(1). This policy decision is based on the Congressional purpose of encouraging conciliation and voluntary settlements of disputes and is supported by a long line of case authority."

In Mickel v. South Carolina State Employment Service, supra, the Fourth Circuit stated:

> "It seems clear from the language of the statute that a civil action could be brought against the respondent named in the charge filed with the Commission only after conciliation efforts had failed, or, in any event, after opportunity had been afforded the Commission to make such efforts."

In the instant case, no timely complaint was ever filed against any of the defendants or anyone else with respect to alleged discrimination occurring prior to Sevor's voluntary retirement. Accordingly, the instant Federal Court action is conclusively jurisdictionally defective as a matter of law, at the very least as to that portion of plaintiff's complaint. Partial summary judgment on this aspect of the case should be granted now in the interest of justice and sound judicial administration.

8. If the panel decision of March 17, 1977 is not reviewed now and the legal questions are not resolved at this time, there will be an enormous waste of judicial time and manpower, not to speak of the burden and expense to the litigants entailed in far-ranging irrelevant discovery. In view of the foregoing, the panel decision to remand should be vacated and this Court should decide the legal issues presented on the merits.

WHEREFORE, your petitioners request that:

1. The petition for a rehearing be granted; and

2. The petition for rehearing should be heard by the Court in banc.

3. The Court grant such other relief as may be deemed just and proper in the circumstances.

Dated: March 24, 1977

BRENNAN, CENTNER, PALERMO & BLAUVELT

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Anthony R. Palermo

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Attorney for Petitioners
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360 North Crescent Drive
Beverly Hills, California 90210

CERTIFICATE OF COUNSEL

As counsel for the petitioners herein, I hereby certify that, based on my professional judgment, the foregoing petition for rehearing with a suggestion for rehearing in banc is presented in good faith and not for delay; and further that, because it raises significant questions of exceptional importance, it is wholly meritorious.

Dated: March 24, 1977

BRENNAN, CENTNER, PALERMO & BLAUVELT

By: Anthony R. Palermo
Anthony R. Palermo

Attorneys for Petitioners
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Beverly Hills, California 90210

Exhibit A — Order
attached to Petition for Rehearing in Banc.

UNITED STATES COURT OF APPEALS

Second Circuit

16-7313

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 9th day of December, one thousand nine hundred and seventy-six.

Geraldine Sever,

Plaintiff-Appellee,

v.

Litton Industries, Inc., Litton Automated Business Systems, Inc., and McBee Systems, a subsidiary of Litton Industries,

Defendants-Appellants.

It is hereby ordered that the motion made herein by counsel for the

appellant ~~appellees petitioners respondents~~

~~motion for extension~~ dated November 19, 1976 for leave to appeal pursuant to 28 USC §1292(b)

be and it hereby is granted ~~denied~~.

Leonard P. Moore
LEONARD P. MOORE
Wilfred Feinberg
WILFRED FEINBERG
Murray I. Gurfein
MURRAY I. GURFEIN / Circuit Judges

Exhibit B – Motion for Leave to Appeal
attached to Petition for Rehearing in Banc.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

GERALDINE SEVOR,

Plaintiff-Appellee,

-vs-

LITTON INDUSTRIES, INC.,
LITTON BUSINESS SYSTEMS, INC., and
McBEE SYSTEMS, A Subsidiary of
Litton Industries,

Defendants-Appellants.

PETITION FOR LEAVE
TO APPEAL

Docket No. 76-7373

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT:

The petition of defendants Litton Industries, Inc., Litton Business Systems, Inc., and McBee Systems, incorrectly designated by plaintiff as "A Subsidiary of Litton Industries", respectfully represents as follows:

ORDERS AND DECISIONS INVOLVED

1. This petition seeks leave to appeal, under Section 1292(b) of Title 28 U.S.C., from an order and decision of the Honorable Harold P. Burke dated June 29, 1976, as subsequently amended by order and decision of the Honorable John T. Curtin dated November 16, 1976. Judge Burke's order, a copy of which is attached as Exhibit A, denied a motion of petitioners to dismiss the complaint on various jurisdictional and procedural grounds. Judge Curtin's decision and order granted petitioners' motion for certification. A copy of said decision and order is attached as Exhibit B.

The decision and order of Judge Curtin expressly

finds that the several questions raised meet the standards for certification under 28 U.S.C. §1292(b), i.e., they present "controlling questions of law as to which there is substantial ground for difference of opinion", on which an appeal "may materially advance the ultimate termination of the litigation". See Exhibit B, page 2. Petitioners believe the decision of Judge Curtin on the issue of certification is well-reasoned and sound and respectfully request this Court to accept jurisdiction of this appeal under 28 U.S.C. §1292(b).

PENDING APPELLATE PROCEEDING

2. A notice of appeal from Judge Burke's order has been filed, the record on appeal transmitted, and appellants' brief and appendix filed and served. Petitioners believe this Court has the power to accept appellate jurisdiction under the All Writs Statute, Title 28 U.S.C. §1651 and under this Court's inherent power to supervise the administration of justice. It is recognized that such appellate review is granted only rarely. Accordingly, after pre-argument conference before the Honorable Nathaniel Fensterstock, petitioners moved in the District Court for certification of questions of law for interlocutory appeal under Title 28 U.S.C. §1292(b). Petitioners moved in this Court for an order remanding the matter for the limited purpose of having the District Court rule on the application for certification. A copy of this Court's order of remand is attached as Exhibit C. Thereafter, pending the District Court's deliberation, Scheduling Order #3 was issued which extended plaintiff-appellee's time to file briefs until ten (10) days after certifi-

cation or denial thereof. A copy of said scheduling order is attached as Exhibit D.

STATEMENT OF FACTS

3. A statement of facts necessary to an understanding of the controlling questions of law determined by the District Court's order is set forth at pages 5-9 of petitioners' brief. Said brief was previously filed with the Clerk of the Court of Appeals in September 1976 and again as part of petitioners' application for remand. Said brief and the statement of facts is incorporated herein by reference.

QUESTIONS OF LAW PRESENTED

4. The questions of law which petitioners herein request this Court to determine are the same as those set forth in the decision and order of Judge Curtin. They are as follows:

A. Whether service of process on a manager of a wholly owned, but independently operated subsidiary, as described in this case, constitutes valid service upon a parent corporation.

B. Whether an employee of an autonomous independently operated division of a subsidiary corporation can be considered an "employee" of a parent corporation for purposes of a suit under Title VII.

C. Whether timely filing of a complaint with the EEOC against specific respondents is a jurisdictional prerequisite to a suit against them in federal court under Title VII.

D. Whether claims which arise out of acts occurring more than two years prior to commencement of federal court suits are time-barred under the Equal Pay Act.

REASONS FOR ACCEPTING APPEAL

5. A substantial basis for a difference of opinion on the questions presented exists for the reasons stated in the decision of Judge Curtin and below:

A. Lack of personal jurisdiction over defendant Litton Industries, Inc.

Plaintiff claims personal jurisdiction over Litton Industries, Inc. by virtue of service upon (1) David Miller, an employee of McBee Systems, and (2) Dan Johnson, the Buffalo District Manager of McBee Systems. Plaintiff relies, incorrectly it is submitted, upon a lower court decision in Wisconson which held in effect that for purposes of jurisdiction in a personal injury action, Litton Industries was doing business in the State of Wisconsin by virtue of the publication of its annual shareholders' report. See Handlos v. Litton Industries, Inc., 304 F.Supp. 347 (E.D. Wis. 1969). Petitioners rely upon Rule 4(d)(3) of the Federal Rules of Civil Procedure and the case of Cook v. Bostitch, 328 F.2d 1 (2d Cir. 1964). Petitioners believe that in the circumstances described in this case, service upon an employee of an autonomous division of an independent subsidiary corporation does not constitute valid service upon the parent corporation where the two corporations operate as separate entities and absent a showing of control by the parent. The issue for appeal is whether for purposes of this case, the Bostitch rule should apply to actions brought under Title VII against foreign corporations.

B. Whether an employee of an autonomous independently operated division of a subsidiary corporation can be con-

sidered an "employee" of a parent corporation for purposes of suit.

The issue appears to be novel and no cases in point are known. The facts of employment are clear and uncontradicted, to the effect that plaintiff was never employed by Litton Industries, Inc. If the District Court's decision is allowed to stand, substantial expansion of Federal Court litigation to include uninvolved corporate parents of independent subsidiaries will be promoted. An appeal in this matter would afford this Court the opportunity to construe Title VII and clarify the issue presented. If the issue is resolved on appeal in favor of petitioners, the time, effort and expense of litigation will be substantially reduced and the ultimate termination of this litigation will be advanced materially by eliminating the parent corporation from the suit. As indicated in the record, the parent is composed of numerous independent autonomous subsidiary corporations and divisions. These entities and their practices are totally irrelevant to plaintiff's basic charge of McBee Systems' failure to hire in 1975.

C. Whether timely filing of a complaint with the EEOC is a jurisdictional prerequisite to Federal Court suit.

Timely filing of a charge with the EEOC is a jurisdictional prerequisite to suit according to the statutory mandate and applicable case law. See discussion in Point III of petitioners' brief previously filed and cases cited, including Moore v. Sunbeam Corp., 459 F.2d 811 (7th Cir. 1972).

Plaintiff's reliance on this Court's holdings in

Egelston v. State University College at Geneseo, 535 F.2d 752 (2d Cir. 1976), and Noble v. The University of Rochester, 535 F.2d 756 (2d Cir. 1976), is misplaced. Both Egelston and Noble involved situations where the claimants were still employed at the time of the alleged injurious practice. Thus, this Court held the doctrine of "continuing violation" prevented the complaints from being time-barred. In the instant case, plaintiff had voluntarily terminated her employment with Litton Automated Business Systems effective August 31, 1973, some eighteen (18) months and over 500 days before filing any charge with any agency, state or federal.

The questions involved appear to be unresolved in the Second Circuit. In footnote 5 of the Egelston case, supra, this Court expressly stated in reference to the 180 day period and the 300 day time limit of Title VII as follows:

> "Nor need we - or do we - resolve the still-open question of whether these time requirements for filing with the agency are 'jurisdictional prerequisites' to suit in the Federal Courts."

The holdings of Moore v. Sunbeam Corp., supra, and the other cases cited at page 18 of petitioners' appellate brief appear to state explicitly that timely filings are "jurisdictional prerequisites" to suit. As noted in the decision of Judge Curtin, the issue of whether an unrelated isolated failure to hire in 1975 can be the basis for reviving alleged claims regarding prior employment with an independently operated autonomous division of a subsidiary corporation seems ripe for appellate

decision by this Court.

Petitioners also believe that an additional prerequisite to Federal Court suit is that such suit may be brought only against the party charged with the EEOC complaint and only with respect to the particular allegations outlined. See discussion and cases cited at page 19 of petitioners' brief on appeal. The contention of plaintiff that the doctrine of "continuing violation" applies is unwarranted in the facts of this case. It is believed an appellate decision in this area would also be appropriate.

D. Whether claims which arise out of acts occurring more than two (2) years prior to commencement of Federal Court suit are time-barred under the Equal Pay Act.

Plaintiff's suit was commenced nearly two and one-half (2 1/2) years after her voluntary termination of employment. She contends that the filing of a complaint with the EEOC operates to toll the statute of limitations expressly provided by Congress under the Equal Pay Act. No authority for this proposition has been found, either in the case law or statute.

The opinion of Judge Curtin squarely discusses the issues raised and the reasons why the matter should be considered by this Court, not only for the benefit of this case but for other similar litigation.

BENEFITS OF IMMEDIATE APPEAL

5. As found by Judge Curtin, an appellate decision regarding some or all of the issues presented will materially advance the ultimate termination of this litigation by elimina-

ting or drastically reducing discovery. The issues could be narrowed significantly, which will eliminate the need for court supervision of discovery, and the trial itself could be greatly simplified. Moreover, the issues involved seem significant, not only for purposes of this suit but generally to resolve unsettled recurring legal questions.

WHEREFORE, petitioners pray for leave to appeal under §1292(b) of Title 28 U.S.C. from the orders and decisions hereinabove described.

Dated: November 19, 1976
Rochester, New York

BRENNAN, CENTNER, PALERMO & BLAUVELT

By: Anthony R. Palermo

Attorneys for Petitioners
Office and Post Office Address
500 Reynolds Arcade Building
Rochester, New York 14614

Judge Burke's Order attached as Exhibit A
to Motion for Leave to Appeal.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

GERALDINE SEVOR,

Plaintiff

- vs -

CIVIL 75-559

LITTON INDUSTRIES, INC., LITTON AUTOMATED BUSINESS SYSTEMS, INC., and McBEE SYSTEMS, A Subsidiary of Litton Industries,

Defendants

Pamelyn Logan-Baldwin
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Attorney for plaintiff

Brennan, Centiner, Palermo & Blauvelt
500 Reynolds Arcade Building
Rochester, N.Y. 14614
Attorneys for defendants

The original complaint naming Litton Industries and McBee Systems, a Subsidiary of Litton Industries, as defendants, was filed December 30, 1974. There followed a first amended complaint and a second amended complaint. The second amended complaint named as defendants, Litton Industries, Inc., Litton Automated Business Systems, Inc., and McBee Systems, A Subsidiary of Litton Industries.

By motion with supporting papers, filed May 3, 1976, Litton Industries Inc., Litton Automated Business

Judge Burke's Order attached as Exhibit A to Motion for Leave to Appeal.

Systems, Inc., and McBee Systems, moved to dismiss the second amended complaint on grounds separately numbered in the motion and for a protective order with respect to plaintiff's first notice to produce documents, to vacate the notice, or in the alternative, to defer response to the notice pending determination of the motions addressed to service of the pleadings and the sufficiency of the pleadings, or in the alternative, to limit discovery of records sought to that entity which was plaintiff's actual employer at times relevant to any pleadings which may be permitted.

The defendants had previously moved to dismiss and for a protective order on February 10, 1976. The plaintiff on March 22, 1976 by notice of motion, with supporting papers, moved for an order compelling the defendants to produce documents pursuant to a notice to produce.

Supporting affidavits were submitted by the defendants as follows, Robert D. Lentz sworn to February 23, 1976, David Miller sworn to March 25, 1976, Dan Johnson sworn to March 31, 1976 and Anthony R. Palermo sworn to April 7, 1976 Since matters outside the pleadings have been submitted defendants' motion to dismiss is deemed to be a motion for summary judgment.

The motion of Litton Industries, Inc., Litton Automated Business Systems, Inc., and McBee Systems, to

Judge Burke's Order attached as Exhibit A to Motion for Leave to Appeal.

dismiss the second amended complaint and for a protective order, or in the alternative, to defer response to the notice pending determination of the motions addressed to service of pleadings and the sufficiency of the pleadings, is in all respects denied.

The defendants shall comply with plaintiff's notices to produce filed December 21, 1975 and May 24, 1976, by producing the documents at a mutually agreeable time and place on or before July 30, 1976. If the parties are unable to agree on a time and place, I will fix by order a time and place on ex parte application.

ALL OF THE ABOVE IS SO ORDERED.

Harold P. Burke

HAROLD P. BURKE
United States District Judge

June 29, 1976.

Decision and Order attached as Exhibit B
to Motion for Leave to Appeal.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

GERALDINE SEVOR,

Plaintiff-Appellee,

-vs- Civ-75-559

LITTON INDUSTRIES, INC.,
LITTON BUSINESS SYSTEMS, INC., and
McBEE SYSTEMS, A Subsidiary of
Litton Industries,

Defendants-Appellants.

APPEARANCES: EMMELYN LOGAN-BALDWIN, ESQ.
Rochester, New York,
for Plaintiff-Appellee.

BRENNAN, CENTNER, PALERMO & BLAUVELT
(ANTHONY R. PALERMO, ESQ., of Counsel)
Rochester, New York,
for Defendants-Appellants.

The defendants have moved for certification of certain questions of law for interlocutory appeal to the Second Circuit under 28 U.S.C. §1292(b).

This action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq., and the Equal Pay Act, 29 U.S.C. §206(d), was originally brought before Honorable Harold P. Burke. Judge Burke denied the

defendants' motion for summary judgment on June 29, 1976. Defendants' motion for certification is currently before this court because Judge Burke was not available at the time of this application.

Under §1292(b), an interlocutory appeal may be brought if certified by the district court. The standard for certification requires "a controlling question of law as to which there is substantial ground for difference of opinion" on which an appeal "may materially advance the ultimate termination of the litigation . . .."

Although not formally presented, it is implicit in the argument of defendants that Judge Burke incorrectly decided the motions before him. Although a district judge may reconsider a prior ruling made by another judge, this action should be taken only in circumstances not presented here. This application is before me because of the unavailability of Judge Burke due to illness. Unless the case is reassigned, further proceedings will be before him. Dictograph Products Co. v. Sonotone Corp., 230 F.2d 131 (2d Cir. 1956).

Decision and Order attached as Exhibit B to Motion for Leave to Appeal.

This court finds that an appellate ruling on these issues will materially advance the ultimate termination of the litigation. Discovery, especially production of records, will be enormously reduced if, on appeal, the parent corporation is dismissed from the suit and the issues involved in the plaintiff's prior employment are narrowed. This would eliminate the need for extensive court supervision of discovery and greatly simplify the trial itself.

In their motion, the defendants present several questions for certification. Without discussing the merits of the legal argument, it is the opinion of this court, based upon the briefs and oral argument presented by the parties, that the following questions meet the standards for certification under 28 U.S.C. §1292(b).

1. Whether service of process on a manager of a wholly owned, but independently operated subsidiary, as described in this case, constitutes valid service upon a parent corporation.

The question of jurisdiction over the parent corporation through service on its subsidiary is a difficult

one. In challenging the service of process, defendant had relied on Cook v. Bostitch, 328 F.2d 1 (2d Cir. 1964), as the controlling law in this circuit. However, it appears to this court that the Bostitch rule may be narrowly construed to apply only in cases of diversity jurisdiction. Plaintiff argues that the general principles of International Shoe Co. v. State of Washington, 326 U.S. 310 (1945), should apply to give jurisdiction in this case. Furthermore, plaintiff cites a district court ruling in a case involving the same defendant, where jurisdiction was granted over the parent corporation by service on its subsidiary. See Handlos v. Litton Industries, Inc., 304 F.Supp. 347 (E.D.Wis. 1969).

The issue therefore is whether for purposes of federal question jurisdiction the evidence set forth in affidavits of connection between the parent and subsidiary constitutes a sufficient relationship between the two to give personal jurisdiction over the parent, despite evidence of independent management.

2. Whether an employee of an autonomous independently operated division of a subsidiary corporation can be considered an "employee" of a parent

Decision and Order attached as Exhibit B to Motion for Leave to Appeal.

corporation for purposes of a suit under Title VII.

The defendants have raised a question of law involving the basic scope of the "employer" and "employee" relationship under 42 U.S.C. §2000e-2. The court has been unable to find any judicial interpretation of the scope of the statutory terms as applied to parent and subsidiary corporations. Therefore, an appeal is warranted to clarify this issue.

3. Whether timely filing of a complaint with the EEOC against specific respondents is a jurisdictional prerequisite to a suit against them in federal court under Title VII.

Defendants challenge the court's jurisdiction under Title VII on plaintiff's claims arising from her employment with Litton Automated Business Systems from March 10, 1969 to August 31, 1973.

Defendants contend that plaintiff's filing of her claim with the EEOC on March 28, 1975 is untimely since it took place nearly two years after her resignation to attend college. It is urged that timely filing of the EEOC complaint is a prerequisite to federal court

suit. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 798 (1973); Cates v. Trans World Airlines, Inc., 8 E.P.D. ¶9755 (S.D.N.Y. 1975). This question has yet to be decided by the Second Circuit. Egelston v. State University College at Geneseo, ____ F.2d ____ (2d Cir. June 7, 1976), slip op. Docket #76-7047, n.5.

In addition, defendants argue that another jurisdictional prerequisite to federal court suit is that the suit may be brought only against the party charged in the EEOC complaint and only with respect to the particular allegations specified in the EEOC complaint. See LeBeau v. Libby-Owens-Ford, 484 F.2d 798 (7th Cir. 1973). Here the plaintiff's complaint named only McBee Systems, not Litton Industries, Inc. or Litton Business Systems, Inc. Furthermore, the notice received by McBee Systems stated only a charge for "hiring" and "training/ apprenticeship."

On the other hand, plaintiff asserts that a series of discriminatory acts have been directed against her which constitute a "continuing violation." The time for measuring the statute of limitations should be from

the last act of discrimination, not the first. To effectuate the legislative intent to remedy employment discrimination, plaintiff argues that a liberal construction be made of her claims to include the previous employment with Litton Automated Business Systems. See Belt v. Johnson Motor Lines, Inc., 458 F.2d 443 (5th Cir. 1972); see also Cates, supra.

The controversy over whether the single failure to hire in 1975 may be isolated from claims regarding prior employment with an affiliated subsidiary is ripe for interlocutory appeal.

4. Whether claims which arise out of acts occurring more than two years prior to commencement of federal court suit are time-barred under the Equal Pay Act.

Since plaintiff filed her complaint in the Western District Court on December 31, 1975, nearly two and one-half years after termination of her employment with Litton Automated Business Systems, her complaint is time-barred under the Act unless the equal pay violation is found to be willful. However, the Second Circuit has not yet rendered a determinative ruling on the statute of

limitations questions involved here.

First, the standard for "willfulness" must be established. Defendants argue that some further proof must be made in this case to show willfulness, but cite no legal support for their proposition. Plaintiff urges that the liberal standards adopted by the Fifth Circuit be applied to extend the statute of limitations in this case to three years. See Coleman v. Jiffy June Farms, Inc., 458 F.2d 1139, cert. den. 409 U.S. 948 (1972); Brennan v. J. M. Fields, 488 F.2d 443, cert. den. 419 U.S. 881 (1974); King v. J. C. Penney Co., 58 F.R.D. 649 (N.D.Ga. 1973).

Yet, even if some claim for equal pay based on willful violations in earlier employment may be asserted, the extent of that claim is still in question. Following the rule in King, supra, plaintiff may only bring claims back to December 31, 1972, three years before the filing of her suit.

Thus, a determination should be made whether any claim is timely under the Act and, if so, how far into the past does it survive before it is barred by the

statute of limitations.

ISSUES NOT CERTIFIED

Two requests for certification made by the defendants are found not to meet the standards for §1292(b) certification.

Defendants argue that the Equal Pay Act claims should be dismissed for failure to state a claim. Since the court must liberally construe any complaint, it finds that there is sufficient basis to uphold the complaint. See J. MOORE, FEDERAL PRACTICE ¶12.08, at 2274 (2d ed. 1975). No significant question of law exists for appeal certification.

Defendants also challenge the failure of the district court to strike class action allegations from the complaint and dismiss the suit as a class action. Counsel for the plaintiff, however, has stipulated in open court on October 26, 1976 that no application will be made to bring this action as a class action. Therefore no further deliberation is required on this issue and certification is denied.

The June 29, 1976 order of Judge Burke is amended to certify the questions stated above for interlocutory appeal to the Second Circuit Court of Appeals under 28 U.S.C. §1292(b). The current stay of discovery will remain in effect pending the result of this appeal.

So ordered.

John T. Curtin

JOHN T. CURTIN
United States District Judge

DATED: November 16, 1976

Court's Order of Remand attached as Exhibit C
to Motion for Leave to Appeal.

rec'd
rec 10/22/

No.1 10-19-76

76-7373
C 5

UNITED STATES COURT OF APPEALS

Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 19th day of October, one thousand nine hundred and seventy-six

76-1373

Geraldine Sevor,

Plaintiff-Appellee,

v.

Litton Industries, Incorporated, Litton Automated Business Systems, Incorporated, & McBee Systems, a subsidiary of Litton Industries,

Defendants-Appellants.

It is hereby ordered that the motion made herein by counsel for the

appellants ~~appellee~~ ~~petitioner~~ ~~respondent~~

by notice of motion dated October 1, 1976 to remand the appeal herein to the United States District Court for the Western District of New York for the limited purpose of hearing and deciding a motion for certification of questions of law pursuant to 28 USC §1292(b) and/or Rule 54(b) of the Federal Rules of Civil Procedure be and it hereby is ~~granted~~ GRANTED GRANTED

It is further ordered that

Paul R. Hays
HON. PAUL R. HAYS

Robert P. Anderson
HON. ROBERT P. ANDERSON

Murray I. Gurfein
HON. MURRAY I. GURFEIN Circuit Judges

Scheduling Order attached as Exhibit D
to Motion for Leave to Appeal.

United States Court of Appeals

C-J FOR THE SECOND CIRCUIT

11/11/76

TITLE OF CASE	
GERALDINE SEVOR, Plaintiff-Appellee, V. LITTON INDUSTRIES, INC., LITTON AUTOMATED BUSINESS SYSTEMS, INC., & McBEE SYSTEMS, A Subsidiary of Litton Industries, Defendants-Appellants.	CIVIL APPEAL SCHEDULING ORDER # 3 Docket No. 76-7373 ADDRESS ALL INQUIRIES TO Ms. Wing or Mr. Colman (212) 791-0107

Noting that Emmelyn Logan-Baldwin
counsel for ~~(appellee)~~ appellee)

has filed a ~~motion~~ stipulation for an extension of time to file appellee's brief
and being advised as to the progress of the appeal,
Civil Appeal Scheduling order dated 9-22-76 is modified
~~only~~ in the following respects:

~~IT IS HEREBY ORDERED that the Civil Appeal Scheduling Order dated~~

~~IT IS FURTHER ORDERED that the appellee's brief and~~

IT IS ~~FURTHER~~ ORDERED that ~~the brief of the appellee be filed on or before~~ within ten (10) days after calendar pursuant to §1292(b) or denial thereof appellant shall ~~the Stipulation~~ file appropriate papers with the Clerk of the Court.

IT IS FURTHER ORDERED that ten (10) copies of each brief shall be filed with the Clerk, but that the court may require as many as fifteen (15) additional copies before final disposition of the action.

IT IS FURTHER ORDERED that the argument of the appeal be ready to be heard during the week of

IT IS FURTHER ORDERED that in the event of default by appellant in filing the record on appeal or the appellant's brief and the appendix by the time directed or upon default of the appellant regarding any other provision of this order, the appeal shall be dismissed forthwith.

IT IS FURTHER ORDERED that if the appellee fails to file a brief within the time directed by this order, such appellee shall be subjected to such sanctions as the court may deem appropriate.

A. DANIEL FUSARO,
Clerk

By N. Daniel Feldstock
Nathaniel Feldstock
Staff Counsel

Dated: November 8, 1976
CAM? lm
9/76

Exhibit C – Order of the Second Panel attached to Petition for Rehearing in Banc.

United States Court of Appeals

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 17th day of March one thousand nine hundred and seventy-seven.

Present:

HON. WILLIAM HUGHES MULLIGAN

HON. JAMES L. OAKES,

Circuit Judges

HON. FREDERICK van PELT BRYAN,
~~Circuit Judges~~ District Judge

GERALDINE SEVOR, Plaintiff-Appellee, -against- LITTON INDUSTRIES, INC., et al. Defendants-Appellants	76-7373

We find that this court improvidently granted certification pursuant to 28 U.S.C. § 1292(b) for the questions presented by this interlocutory appeal. Slade v. Shearson, Hammill, & Co., 517 F.2d 398 (2d Cir. 1974). This case is remanded in accordance with this order. Costs are taxed to neither party.

William Hughes Mulligan, C.J.

James L. Oakes, C.J.

Frederick van Pelt Bryan, D.J.

Affidavit of Service

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March 30, 1977

Re: **Sevor vs. Litton Industries, et al.**

State of New York)
County of Onondaga) ss.:
City of Syracuse)

EVERETT J. REA,
Being duly sworn, deposes and says: That he is associated with Spaulding Law Printing Co. of Syracuse, New York, and is over twenty-one years of age.

That at the request of **Brennan, Centner, Palermo & Blauvelt,**

Attorney(☒) for **Defendants-Appellants,**

(☒) he personally served three (3) copies of the printed ☐ Record ☐ Brief ☐ Appendix ☒ **Petition** of the above entitled case addressed to

EMMELYN S. LOGAN-BALDWIN, ESQ.
Attorney At Law
Office and Post Office Address
510 Powers Building
Rochester, New York 14614

☐ By depositing true copies of the same securely wrapped in a postpaid wrapper in a Post Office maintained by the United States Government in the City of Syracuse, New York.

☒ By hand delivery **by The Daily Record Corp., Rochester, N.Y. on March 30, 1977.**

Everett J. Rea

EVERETT J. REA

Sworn to before me this **30th** day of **March, 1977.**

Donald E. Finnie

~~Notary Public~~
Commissioner of Deeds

cc: Brennan, Centner, Palermo & Blauvelt, Esqs.